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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. ——

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

WILSON & CO., INC., SWIFT & COMPANY, ARMOUR AND COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND BELL SYSTEM ASSOCIATED COMPANIES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States and the Federal Communications Commission, petitions for a writ of certiorari to review a final judgment of the Court of Appeals for the Seventh Circuit insofar as the court terminated the proceeding without providing for the restitution of excess charges paid under an injunction *pendente lite*.

OPINION BELOW

The opinion of the court of appeals (Appendix A *infra*, pp. 15–36) is reported at 335 F. 2d 788.

JURISDICTION

The judgment of the court of appeals was entered on September 17, 1964 (Appendix B *infra*, pp. 37–38). On December 14, 1964, Mr. Justice Clark extended

to February 14, 1965, the time within which to file a petition for a writ of certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Federal Communications Commission entered orders revising common carrier rates for private-line telegraph service and private-line telephone service, the general effect of which was to raise telegraph rates and to lower telephone rates. Only the higher telegraph rates were challenged in the review proceeding brought by the respondent meatpacking concerns. On the meatpackers' motion to stay the telegraph increases, the court below, accepting the proposal of American Telephone and Telegraph Company (an intervenor), stayed, *pendente lite,* the whole of the Commission's orders, including the lowered telephone rates, and declined to condition the stay so as to protect telephone customers who might be adversely affected. In its final decision, the court of appeals affirmed the Commission's orders in all respects. Despite the government's request, the court terminated the proceeding without considering or providing restitution to those customers who were deprived, during the pendency of the appeal, of the lower telephone rates ordered by the Commission.

The question presented is whether the court of appeals had a duty in equity, once it had sustained the Commission's rate orders on the merits, to require the carrier to return to its private-line telephone customers the excess rates it had collected, under the stay *pendente lite,* during the pendency of the appeal.

STATEMENT

On March 7, 1956, the Federal Communications Commission, acting pursuant to Sections 201–205 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 201–205, 403, instituted a hearing on the lawfulness of charges for private-line services provided by American Telephone and Telegraph Company and Bell System Associated Companies ("AT&T") and The Western Union Telegraph Company ("Western Union") (21 Fed. Reg. 1614). Private-line services consist of the leasing of communications channels for transmission between specified locations without requiring the carrier to establish connections for each individual call or message. The primary services are telegraph and telephone. Both AT&T and Western Union provide private-line telegraph service, but only AT&T provides private-line telephone service.

After extended hearings, the Commission issued an initial decision on July 14, 1961 (R. 1–268),[1] in which it found that AT&T's and Western Union's telegraph rates were unreasonably low and that AT&T's telephone rates were unreasonably high (R. 103). The Commission concluded that rate revisions were necessary in both classes of service, and that such revisions should be prescribed by the Commission (R. 103). Although some increases and some reductions in rates were made within each class of service, in general private-line telegraph rates were raised and private-line telephone rates were lowered.

[1] "R. —" references are to the appendix filed below by the respondent meatpacking concerns.

In revising the rates, the Commission was guided primarily by the precept that "the cost of providing service constitutes the most reliable criterion available for determining just, reasonable and non-discriminatory rates" (R. 96). Accordingly, it analyzed separately the cost data for telephone and telegraph services (see R. 259–262). The Commission also held that the rates for each service, viewed independently, should be reasonable (R. 104). It rejected the argument that, in determining reasonableness, it should look to AT&T's earnings from all private-line services, observing that "care must be taken to avoid excessively high rates for a carrier's noncompetitive services * * * which tend to offset deficiencies resulting from unduly low rates for competitive services" (R. 104).

On January 30, 1963, the Commission issued a final decision (R. 269–311) substantially affirming its initial findings and conclusions. Petitions for reconsideration were denied (except those concerning press rates, not involved here) in a memorandum opinion and order issued on May 29, 1963 (R. 313–323). The Commission's order required AT&T and Western Union to file tariffs, effective as of August 1, 1963, implementing the prescribed rates (R. 322–323).

In a joint petition for review filed in the court below, the respondent meatpacking concerns urged that the Commission's orders "be determined invalid and be set aside" insofar as they directed changes in the rate structure applicable to "private line telegraph service" (R. 339). Concurrently, they filed an appli-

cation for an interlocutory injunction requesting that the Commission's orders be stayed "so far as such orders prescribe the rates, to become effective August 1, 1963, for private line telegraph services furnished to petitioners * * *". The meatpackers also requested a temporary stay pending a hearing on the motion for an interlocutory injunction.

The government opposed the requests for injunctive relief, as did Western Union. AT&T, intervening below, urged that the application for an interlocutory injunction should be denied, but argued alternatively that "if any stay or interlocutory injunction issues, the Court should cause such stay or interlocutory injunction to apply generally to the orders in FCC Docket Nos. 11645 and 11646 which the petitioners have brought before this Court for review, and to suspend the operation of those orders in their entirety" (Answer of AT&T, dated July 29, 1963). The meatpackers replied that they would not object to an enlargement of the requested injunction.

On July 31, 1963, the court temporarily stayed the Commission's orders "in their entirety" for 60 days (Appendix C *infra,* pp. 39–40). On September 27, 1963, after oral argument, it enjoined the orders "in their entirety" pending final decision in the case (Appendix D *infra,* pp. 41–43), and rejected repeated motions of the government to include in any interlocutory injunction conditions designed to protect private-line telephone customers who would be deprived, during the pendency of the appeal, of rate reductions ordered

by the Commission.[2] On November 12, 1963, the full court denied a motion for rehearing *en banc,* with Judge Duffy stating his opinion that "a bond should be required of [AT&T] in order to protect the public from any injury that might result from the injunction heretofore ordered by this Court" (Appendix E *infra,* pp. 44–45).

On December 27, 1963, the government petitioned this Court for a writ of certiorari to review the failure of the Seventh Circuit to condition its injunction (No. 711, O.T. 1963). We argued that the court erred by not "impos[ing] upon AT&T, as a condition of granting it equitable relief, an explicit obligation to refund any charges ultimately found excessive" and by not requiring the carrier "to maintain appropriate accounts to assure the prompt and convenient satisfaction of that obligation" (*id.* at 10). AT&T opposed the petition, principally on the ground that it was premature; the carrier also asserted that it was and had been keeping adequate records so that "any

[2] Thus, on August 2, 1963, the government had filed a motion to modify the temporary stay, limiting it to the relief sought by the meatpackers. Two weeks later, on August 16, we also filed a motion to condition the stay by requiring AT&T to file a bond and render an accounting. And in a supplemental brief filed against the motion for an interlocutory injunction, we again requested that any injunction should be conditioned upon an accounting and refund of charges collected in excess of those prescribed by the Commission, should the Commission's orders eventually be sustained. In addition, on October 30, 1963, after issuance of the interlocutory injunction, the court of appeals denied our motion to file an additional pleading (Appendix F *infra*, p. 46) which proposed that the court permit the carriers to collect during the appeal the higher of the two possible rates for all private-line services, subject to later refund.

rights of ratepayers are fully preserved" (Brief for AT&T in Opposition, No. 711, O.T. 1963, pp. 10–17). Upon the assurance of AT&T that it was maintaining adequate records, the Solicitor General withdrew his support of the petition stating:

> We adhere to our conviction that the omission [of appropriate conditions] was a plain error of law, but we cannot represent, as the case now stands, that the omission create a need—much less the imperious necessity traditionally deemed requisite—for interlocutory review by this Court.[3]

The Commission's petition was denied on March 9, 1964. *United States* v. *Wilson & Co., Inc., et al.*, 376 U.S. 944.

On August 14, 1964, the court below affirmed the Commission's orders on the merits. Pursuant to the direction of the court that the parties submit the proposed form of decree, the government proposed, *inter alia*, that the court retain jurisdiction "solely to the extent necessary to determine such questions of equitable relief arising from the Court's temporary stay of July 31, 1963 and interlocutory injunction of September 27, 1963 as * * * the United States of America and Federal Communications Commission may wish to present * * *." This suggestion was rejected without opinion. On September 17, 1964, the court entered a final decree affirming the Commission's orders, terminating the interlocutory injunction and making the Commission's rates effec-

[3] Supplemental Memorandum for the United States, No. 711, O.T. 1963, p. 3.

tive as of October 1, 1964, but containing no provision for restitution or other equitable relief.[4]

REASONS FOR GRANTING THE WRIT

The decision in this case represents a serious departure from the principle that a reviewing court must take appropriate steps to assure ratepayers the benefit of reductions ordered by the responsible regulatory agency. We have no dispute with the general proposition that there are cases in which considerations of fairness may justify or require a stay, whether sought at the instance of the carrier (or public utility) or by certain of its customers. But a stay—just as much as the denial of a stay—may do injury unless accompanied by conditions or followed by measures assuring the adjustment of the parties' rights at the conclusion of the case.

The government, in this case, was seriously concerned by the failure of the court of appeals, at the time it granted a stay *pendente lite,* to prescribe conditions—a concern heightened by the apparent danger that, in the absence of records maintained for the purpose, restitution later might prove wholly impracticable. We accordingly took the unusual step of petitioning for certiorari at an interlocutory stage.

[4] After entry of the final decree, American Salvage Corporation moved for leave to intervene and to have the decree modified so that the rates prescribed by the Commission would become effective retroactively, as of August 1, 1963. The motion was opposed by AT&T and denied by the court.

In No. 765, this Term, *Wilson & Co.* v. *United States*, the meatpackers have filed a petition for a writ of certiorari on two procedural aspects of the decision below. That petition, opposed by the government, is pending.

The Solicitor General thereafter withdrew his request for review in light of AT&T's assurance, expressed in its brief in opposition, that all necessary records were being maintained. Now, however, at the conclusion of the litigation, the court below has once again failed to address itself to the question of restitution, albeit it has sustained the Commission's rate orders in full.

This Court knows from its prior experience with the regulation of carriers and utilities that large sums of disputed monies may accumulate during the course of a rate proceeding. This case, which involves an exceptionally big carrier, is no exception. A failure to make fair provision for its ratepayers has wide significance as a precedent and is of general concern from the standpoint of effective rate regulation. Morover, the particular circumstances underscore the inequity of the result. AT&T suggested that if the telegraph rates (generally increased by the Commission's order) were stayed, the telephone rates (generally lowered) should also be stayed. The fact is, however, that no one challenged the newly prescribed telephone rates—neither AT&T nor a single customer. When a stay was issued on those terms, the consequence was that telephone users were required to continue to pay the excessive rates, although no one questioned the validity of the reduction ordered. The question at bar is whether this deprivation is to be made permanent.

a. The failure of the Seventh Circuit to retain jurisdiction and take the appropriate steps to see that telephone users injured by its injunction are reim-

bursed was a breach of its duty, sitting as a court of equity, to place those ratepayers "in the position in which they would have been had there not been a postponement of the effective date of the rate reduction * * *." *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577, 586 (Mr. Justice Frankfurter, concurring); *Inland Steel Co.* v. *United States*, 306 U.S. 153, 157–158; *United States* v. *Morgan*, 307 U.S. 183, 191, 197; *Ex parte Lincoln Gas Co.*, 256 U.S. 512, 517; *Arkadelphia Milling Co.* v. *St. Louis S.W. R. Co.*, 249 U.S. 134, 145, 146; *Natural Gas Pipeline Co.* v. *Federal Power Commission*, 128 F. 2d 481, 486 (C.A. 7). For a court must "correct that which has been wrongfully done by virtue of its process." *Arkadelphia Milling Co.* v. *St. Louis S.W. R. Co.*, *supra*, at 146. While most of the decisions in this area, as illustrated by the above cases, deal with the disposition of funds into which rates were paid *pendente lite*, or with analogous payments made under bond, the principle on which they rest covers this case as well. Certainly, the failure of the Seventh Circuit to impose protective conditions at an interlocutory stage should not defeat the right to eventual restitution.[5] As this Court stated in *Baltimore & O. R. Co* v. *United States*, 279 U.S. 781, 786, where no fund was involved:

[5] The aptness of this principle here is underscored by the position taken by AT&T in response to the prior petition to this Court (*supra*, pp. 6–7). It urged that there was no reason to review the failure of the Seventh Circuit to set up a fund for the protection of telephone ratepayers, since the latter's rights could be adequately protected at the termination of the litigation.

> The right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established. And, while the subject of the controversy and the parties are before the court, it has jurisdiction to enforce restitution and so far as possible to correct what has been wrongfully done.

b. Opposing the application of this principle, AT&T argues that restitution of some $7,000,000 which would be due certain of its customers[6] should not be decreed because AT&T was deprived by the injunction of over $5,250,000 in higher rates prescribed by the Commission.[7] It says that it is a mere "stakeholder"

[6] The $7,000,000 overcharges consists of about $6 million collected from about 2,500 commercial customers who use its private-line telephone service and about $1 million from federal and other governmental customers. The above figures and those following are estimated and do not take into account customer or service changes during the stay period. They are derived from information voluntarily furnished by AT&T regarding its billings for each customer for the months of September and October 1964. September was the last month in which the carrier operated under the injunction, and October the first month under the revised rates.

[7] AT&T's figures for September and October 1964 indicate that if the overcharges were balanced against all increased private-line rates (telegraph and telephone) not collected during the stay period, the result would be excess receipts of about $1,650,000, consisting of $1,200,000 from commercial users and $450,000 from government users. While AT&T's argument is unacceptable for reasons developed in the text, there are questions for the court below to resolve in exercising its discretion over restitution. For example, set-offs might arise from the fact that about $150,000 of the telephone overcharges was sustained by customers who had corresponding savings from the stay of telegraph increases. Also, while the Commission's order generally reduced telephone rates, it resulted in increases to certain telephone customers who would have paid

for the different classes of private line customers, and should not be required to pay back any excess charges collected during the interim period in view of its apparent inability to obtain restitution from those customers not before the court—chiefly telegraph users—whose higher rates were also stayed below.[8] We disagree.

AT&T's theory that it was a mere stakeholder depends primarily upon its claim that the telephone and telegraph rates were part of one interdependent private-line rate structure. However, the Commission's orders (see Statement *supra,* p. 4) made it plain that the rates for each private-line service were being fixed independently. Telephone and telegraph were each to yield a reasonable return, computed upon the costs attributable to each particular service. The Commission's express purpose was to remedy AT&T's prior rate structure which was characterized by a low rate of return (about 2.2 percent) on its competitive telegraph service and an excessive rate (approximately 11.5 percent) on its noncompetitive telephone service (R. 102).

In any event, the consideration that it may not be possible to make all of the parties whole at the present stage does not justify the conclusion that the burden should be cast upon telephone customers who were both innocent and uninvolved. No one challenged the validity of the lowered telephone rates. If

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about $1.8 million more during the stay period, an amount which might be considered in computing the windfall to AT&T from the stay of telephone rates.

[8] See Brief for AT&T in Opposition, No. 711, O.T. 1963, p. 12.

AT&T subscribed to the theory that the telegraph and telephone rates were integrally related; it could of course have filed a conditional petition to review when the telegraph rates were challenged. It failed to do so.

AT&T could also have countered the meatpackers' request for a stay of the telegraph rates with the commonplace proposal that the newly prescribed higher rates be collected under bond. It did not adopt that course.[9]

Instead, it proposed that the lowered telephone rates—which, we repeat, were unchallenged—be held in abeyance. One may well question AT&T's standing to make that proposal in the first place. As an intervenor, AT&T was hardly entitled to enlarge the scope of the review proceeding. *Columbus Gas Co.* v. *American Fuel Co.*, 322 U.S. 379; *Chandler & Price Co.* v. *Brandtjen & Kluge, Inc.*, 296 U.S. 53, 58. Be that as it may, the Commission's rate order has now been sustained. In these circumstances, we fail to see how any of the loss incurred as a consequence of the injunction can properly be laid at the door of telephone customers. Certainly, a court of equity may not subordinate the interests of a class of customers to that of the carrier where the customers in

[9] While AT&T agreed in principle with the proposal subsequently made by the government that all parties could be protected by permitting the carriers to collect the higher of the two possible rates for both the telephone and telegraph services during the appeal, subject to later refund (fn. 2, *supra*), AT&T did not make any such suggestion at the time the injunction was sought and granted.

question have suffered wrongful injury by a stay entered at the sole instance of the carrier.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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FEBRUARY 1965.

APPENDIX A

In the United States Court of Appeals for the Seventh Circuit

No. 14269. September Term, 1963. April Session, 1964

WILSON & CO., INC., SWIFT & COMPANY, and ARMOUR AND COMPANY, *Petitioners,* *v.* UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents,* AERONAUTICAL RADIO, INC., THE WESTERN UNION TELEGRAPH COMPANY, and AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*, *Intervenors.*	On Petition to Review Orders of the Federal Communications Commission.

August 14, 1964.

Before KNOCH, KILEY and SWYGERT, *Circuit Judges.*

SWYGERT, *Circuit Judge.* This petition for review, filed pursuant to section 402(a) of the Communications Act of 1934, 47 U.S.C. § 402(a), and section 4

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of the Judicial Review Act of 1950, 5 U.S.C. § 1034, seeks to invalidate the orders of the Federal Communications Commission prescribing rates for private line telephone and telegraph services furnished by American Telephone & Telegraph Company and associated companies[1] and Western Union Telegraph Company.

Private line services furnish channels for the transmission of communications, at monthly rates, between locations specified by the customer. These services provide the cusomer continuous communication without the necessity of the carriers establishing a connection for each call or message. The basic components of private line services include: intercity channels which connect a central office of the carrier in one city with a central office in another city, local channels which connect the central office with the customer's premises, and equipment for communicating over the channels.

The Commission's order resulted in an aggregate decrease in AT&T rates for private line telephone service and an aggregate increase in rates for private line telegraph service furnished by AT&T and Western Union.

Petitioners Wilson & Co., Inc., Swift & Company, and Armour and Company are three meat packing concerns which use both private line telegraph and telephone services. They intervened in the rate proceeding after the Commission had issued its initial decision. They challenge the Commission's final order insofar as it increases the rates for telegraph service.

[1] Associated companies refers to the Bell System which consists of twenty-one state or regional operating companies, nineteen of which are wholly or principally-owned subsidiaries of AT&T. In the other two companies, AT&T has a substantial minority interest.

AT&T, Western Union, United Press International, Inc., American Newspaper Publishers Association, Inc., and Aeronautical Radio, Inc., have been allowed to intervene in the review in this court. Western Union, in whole, and United Press International and American Newspapers Publishers Association, in part, support the Commission's final order; the others ask that it be set aside.

The administrative proceeding

In 1955 AT&T filed proposed tariff schedules with the Commission offering reduced rates for multiple channel private line service. Western Union filed a protest against the reduction. It claimed that the reduction would have an adverse effect on its private line business. The Commission ordered the suspension of the reduced rates and instituted an investigation of them. It notified AT&T that the carrier had to demonstrate that the new channel rates were justified by the costs of furnishing the various private line services.

While the proceeding was in recess pending AT&T's completion of the cost study, the Commission in March 1958 broadened its investigation to include all private line services offered by AT&T and Western Union except those furnished radio broadcast stations, television stations, and broadcast networks.

During this investigation, the General Services Administration, an intervenor representing the United States, petitioned the Commission to reduce AT&T's charges for private line telephone service, alleging that the carrier's cost study revealed that AT&T was deriving an excessively high rate of return. The Commission in June 1958, in granting GSA's petition in part, directed AT&T to reduce its private line telephone rates by not less than $5,700,000 per year,

finding that "the charges of AT&T * * * for private line services using telephone grade channels are unjustly and unreasonably high and should be reduced." At the same time the Commission found that AT&T's return for private line telegraph services was only 2.6 per cent as of 1955 and 1.7 per cent as of 1957. The Commission observed that the telegraph rates of both AT&T and Western Union "may be inadequate to provide the respondents with a fair return."

Thereafter, AT&T and Western Union in August 1958 requested interim relief by filing revised tariffs increasing their private line telegraph rates. GSA and twenty private line telegraph users who intervened at this time (not including petitioners) objected to the proposed rates. These tariffs were subsequently withdrawn because the Commission found that the record did not support the proposed modifications even though some increase in rates was warranted.

AT&T and Western Union filed substitute tariffs in October 1958 for private line telegraph rates. The Commission conditionally authorized the rates to go into effect on December 2, 1958, subject to section 204 of the Communications Act of 1934, 47 U.S.C. § 204, requiring the carriers to keep an account of the amounts collected so that the Commission, in its final decision, might order refunds. Under the revised interim tariffs, the level of private line earnings of both AT&T and Western Union increased to about 5.9 per cent.

The administrative record was closed in September 1959. The hearing officer in January 1960 certified without decision the record to the Commission in accordance with the Commission's direction. The Commission's initial decision was filed July 6, 1961. The decision prescribed a complete revision of the

rate structure for all private line telephone and telegraph services furnished by AT&T and Western Union. A number of users requested the Commission to reconsider, including petitioners who intervened in the administrative proceeding after the Commission had issued its initial decision.

All petitions for reconsideration were denied except those filed by American Newspaper Publishers Association and United Press International. The Commission said that the petitions of the press raised "substantial questions regarding the impact which changed private line telegraph and * * * telephotograph rates * * * would have upon the dissemination of news information." The Commission excepted the press from its final order and inaugurated further investigation to determine if the new rates would "impair * * * the dissemination of news." As to all other users of private line telephone and telegraph services, the Commission ordered the rate prescribed in its initial decision to be effective as of August 1, 1963.

The Commission's decision and order

Except for the exemption granted the press, the final decision, dated May 29, 1963, affirmed without significant modification the initial decision. The order increased the carriers' rates for private line telegraph service and decreased AT&T's private line telephone rates.

The Commission discussed extensively AT&T's and Western Union's cost studies, as adjusted by the Commission. It was the opinion of the Commission that the cost of providing services constituted the most reliable criterion available to determine reasonable and nondiscriminatory rates. The Commission said that it would regard costs either as directly controlling

or as reference points from which to measure the extent of any departure therefrom based on other rate making considerations.

The Commission concluded that the proper level of private line earnings was 9 per cent for Western Union and 7.25 per cent for AT&T. It held, however, that it could not prescribe rates for Western Union which would give it a 9 per cent overall level of earnings because the evidence indicated that AT&T had lower costs for the service and to permit Western Union to obtain a 9 per cent return would require either raising Western Union's rates so high as to be noncompetitive or raising AT&T's rates above the level necessary to obtain a 7.5 per cent overall return. The Commission found both solutions undesirable because the "ratepayers are entitled to benefits from competitive service offerings by the carriers," and it was determined to avoid "burdening the ratepayer with higher rates for complete telegraph service than would otherwise obtain if AT&T were the sole carrier." Accordingly, the Commission authorized Western Union to charge rates which if charged by AT&T would permit it to earn at a 7.25 per cent level, thereby limiting Western Union to a 6.4 per cent level of earnings. The Commission concluded that the prescribed rates should result in reasonable earnings for both carriers.

The Commission affirmed its conclusion reached in its initial decision that it must prescribe specific rates for competitive units of private line telegraph services rather than to permit, as AT&T urged, the carriers to set their own rates as long as their total returns did not exceed the levels found reasonable.

Finally, the Commission eliminated the clock-hour schedule and minimum period rate provision. AT&T and Western Union had provided private line telegraph service to customers on a monthly contract basis for one

or more days a week and for a minimum period of eight hours a day. Daily charges were scaled down as the number of days of service per week increased. As the number of hours of use per day over eight increased, the rate per hour decreased. Superimposed upon this rate structure was the clock-hour schedule, which divided the day into four periods and established a different rate per hour within each period. The period with the highest rate covered the normal business day, 9 a.m. to 6 p.m. The lowest rate applied to the period between 12 a.m. and 6 a.m.

Abolishing both the minimum period provisions and the clock-hour schedule, the Commission imposed the requirement that all private line telegraph service should be offered on a continuous monthly basis, seven days a week, twenty-four hours a day. The Commission found that, "[T]here is little, if any, difference in the cost of furnishing service during the day or night." Furthermore, the Commission noted that ordinarily telegraph channels furnished for daytime-only leases were not used by another customer at night. Concerning the minimum period provisions, the Commission held that "differences in the rates for minimum period and continuous services are not justified by cost differences" since the costs of providing continuous service has not been substantially greater than for minimum period service.

Petitioners attack the final order, claiming procedural errors on the part of the Commission, and, on the merits, contending that the order is not supported by adequate findings or the record.

Procedural aspects

Petitioners challenge the Commission's order on the procedural grounds that they did not receive adequate notice of the proceeding, that the participation by the

Commission's Common Carrier Bureau counsel in the decision of the agency violated the Communications Act of 1934, the Administrative Procedure Act, and the Commission's own rules of practice, and that the Commission erroneously denied ratepayers the right to cross-examine witnesses on the issue of the carriers' cost of service.

We disagree with the Commission that petitioners waived their right to raise these questions in this court for failure to raise them in the administrative hearing. We do not think petitioners had to raise the issues of adequacy of notice and the right of cross-examination as long as these issues were raised by a party to the proceeding during the hearing. The reason for the rule that such questions should not be raised initially in the court of review is that the administrative agency ought to have the opportunity to rule on the questions in the first instance. *Hennesey* v. *SEC,* 285 F. 2d 511 (3d Cir. 1961).

Petitioners did not object at the administrative hearing to the ex parte participation by Commission counsel in the decision of the Commission but have raised the issue by affidavits for the first time in this court. We think the affidavits properly present the question. Cf. *Massachusetts Bay Telecasters* v. *FCC,* 261 F. 2d 55 (D.C. Cir. 1958); *WKAT, Inc.* v. *FCC,* 258 F. 2d 418 (D.C. Cir. 1958). We are not persuaded by the argument of the Commission and AT&T that petitioners were on notice during the hearing that such participation might occur and hence should have filed their objections with the Commission.

We turn to the merits of these issues.

Notice

The issue is raised whether the final order is invalid because the Commission's notice in the Federal Register announcing the investigation of the carriers'

private line rates failed to apprise interested parties or the public of the issues to be considered in the hearing. Petitioners contend that there was no "description of the subjects and issues involved" as required by sections 2(c) and 4(a) of the Administrative Procedure Act, 5 U.S.C. §§ 1001(c), 1003(a); the notice "described the issues solely in the language of the Communications Act"; and that even if the initial notice was adequate, there was no notice of the added issues created during the proceeding in 1958 when the Commission conditionally increased the rates for private line telegraph services and ordered the carriers to account for the increase in order to facilitate possible refunds. Such action, they say, substantially altered the proceeding, requiring notice of the rate hearing in a more specific manner than was given.

The Commission's order of March 7, 1956, published in the Federal Register, enumerated each of the private line rates subject to investigation and stated that AT&T was requested "to conduct a study to determine the cost in furnishing private line services and channels." The Commission noted that "it is desirable to determine in a single proceeding the lawfulness of all tariff schedules applicable to private line services and channels." The notice included as issues to be investigated: whether there existed within the tariffs then in effect unreasonable discriminations or preferences, unreasonable rates, and if the Commission should prescribe new rates. The notice adequately apprised all interested parties of the Commission's intention to conduct a general investigation of the private line tariffs of AT&T and Western Union, of the lawfulness of the carriers' rates, and the possibility of prescription of new rates.

The notice was not, as petitioners contend, a statement of issues in general statutory language of legis-

lative delegation of authority. It was as specific as the Commission could have made it at the time. Accordingly, we hold that the publication was sufficiently detailed to give notice that broad rate adjustments for telegraph services were to be the subject matter of the investigation and, therefore, constituted adequate notice as required by the Administrative Procedure Act. The interim rate increase and the accounting order did not add new issues to the proceeding requiring additional notice although, in fact, the Commission announced the procedure it would follow in determining the lawfulness of the interim rates in a memorandum opinion, dated January 28, 1959, and published in the Federal Register.

We conclude that petitioners' contention of lack of notice is without merit.

Denial of right to cross-examine witnesses

Three intervenors, General Services Administration, Aeronautical Radio, Inc., and United Press International, participated fully in the administrative hearing. The remaining parties, who intervened prior to the Commission's initial decision, were denied the right to cross-examine witnesses about the carriers' cost of service studies introduced in the hearing. The question is whether this ruling invalidated the order. Petitioners urge that the so-called limited intervenors, as ratepayers, were entitled as of right to cross-examine witnesses irrespective of the lateness of their intervention.

Section 2(b) of the Administrative Procedure Act, 5 U.S.C. § 1001(b), provides: "[N]othing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes." The Commission's rules provide that the Commission may permit intervention "limited to particular issues

or to a particular stage of the proceeding."[2] We hold that it is proper for the Commission to consider lateness as a ground for limiting a party to the state of the proceeding at the time he intervenes.

In the circumstances of this case, we perceive no prejudice to these late-filing intervenors resulting from the limitation on cross-examination. The cost phase of the investigation had been substantially completed when they intervened. Other ratepayers who intervened early in the proceeding subjected the cost evidence to examination. To have permitted the late-filing intervenors to plow the same ground would only have delayed the hearing unduly.

We do not agree that the Commission's November 25, 1958 order permitting interim rates subject to refund constituted the initiation of a new proceeding that required the Commission to allow the limited intervenors to participate fully. Section 204 of the Communications Act, 47 U.S.C. § 204, provides that, "[I]n case of a proposed increased charge, the Commission may by order require * * * account * * * and * * * refund." In considering the question of possible refunds, the Commission did not institute a new proceeding; it merely added an ancillary question to be considered in the hearing. Consequently, the November 1958 order did not affect the timeliness of the petitions for intervention to give the limited intervenors the right to participate fully.

In their request for leave to intervene, petitioners made no offer to prove or disprove disputed facts. Rather, they limited their objections to the Commission's conclusions drawn from the primary facts submitted to the agency. For this reason alone, their complaint has no merit. Petitioners attempt to assert rights which they claim belong to other parties. We

[2] 47 C.F.R. § 1.104(d) (now § 1.223(d), 28 Fed. Reg. 12426).

do not believe they should be accorded the rights the limited intervenors may have, resulting from the denial of cross-examination, when petitioners do not claim the right of cross-examination for themselves.

Ex parte participation by agency counsel

We hold that it was proper for members of the Commission's Common Carrier Bureau who were counsel of record in the hearing before the Commission to participate in the decisional process that led to the orders under review; and that this conduct did not violate section 3(a) of the Administrative Procedure Act, 5 U.S.C. § 1002(a), sections 409(c) and 205(a) of the Communications Act of 1934, 47 U.S.C. §§ 409(c), 205(a), the Commission's own rules, as well as constitutional due process.

Petitioners' principal argument is that section 409 (c) of the Communications Act[3] applied to the instant proceeding because the investigation concerned the validity of rates then in effect as distinguished from prescribing rates to become effective in the future; that the section renders the proceeding an "adjudica-

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[3] Section 409(c)(3) provided in part:

> No person * * * engaged in the performance of investigative or prosecuting functions for the Commission * * * shall advise, consult, or participate in any case of adjudication (as defined in the Administrative Procedure Act).

On August 31, 1961, section 409(c) was amended, deleting the above subsection. However, section 409(c)(1) incorporated the ex parte participation provisions as follows:

> In any case of adjudication (as defined in the Administrative Procedure Act) * * * no person who has participated in the presentation * * * of such case at the hearing or upon review shall (except to the extent required for the disposition of ex parte matters as authorized by law) directly or indirectly make any additional presentation respecting such case * * * to the Commission, * * * unless upon notice and opportunity for all parties to participate.

tion" within the meaning of the Administrative Procedure Act. Referring to the Administrative Procedure Act, petitioners point out that section 2(c) of the act, 5 U.S.C. § 1001(c), defines rulemaking as including the "prescription for the future of rates"; since adjudication is defined by section 2(d) of the act, 5 U.S.C. § 1001(d), to be any proceeding not included within the definition of rulemaking, the determination of the validity of rates currently effective is necessarily adjudication; that this interpretation of adjudication is buttressed by section 5 of the act, 5 U.S.C. § 1004.

Petitioners misconceive, however, the nature of the proceeding before the Commission. The Commission's decisions and final order come precisely within the ambit of section 2(c) of the Administrative Procedure Act; the order prescribes "for the future of rates" and therefore was the result of a rulemaking proceeding. The order is not retroactive because the new rates do not go into effect until the order is operative. The question of the validity of the existing rates was ancillary to the primary question of whether new rates should be prescribed. Adjudication was not included in the administrative process.

Even if the initial proceeding was rulemaking, petitioners maintain that the account and refund provisions imposed by the November 1958 order converted the investigation into an adjudicatory proceeding. Here again, the account and refund provisions were ancillary to the primary proceeding and a part of the rulemaking procedure. The interim order increasing the telegraph rates and providing for contingent refunds was of an interlocutory nature akin to a preliminary injunction. These provisions are discretionary means to save private line telegraph users harmless pending the Commission's determina-

tion of whether the future rates should be approved.

Finally, we are of the opinion that the Commission complied with section 3(a) of the Administrative Procedure Act, which provides that, "[E]very agency shall * * * publish in the Federal Register * * * descriptions of its central and field organization, * * * statements of the general cause by which its functions are channeled and determined." The Commission published a statement of organization which apprised petitioners that staff members might participate in preparation of the Commission's decision.[4] The procedure followed by the Commission and its staff did not run counter to statutory requirements. Moreover, the Commission did not violate its own rules nor did the procedure constitute a denial of due process.

Aside from the claimed procedural defects, petitioners attack the validity of the Commission's decisions and order on their merits.

Rate of return

Petitioners contend that the Commission's "allowance for return" is excessive, contrary to law, and not supported by evidence. In the Commission's decision the rate of return on the carriers' investments, more precisely the carriers' level of earnings of private line services, was found to be 6.4 per cent for Western Union (adjusted by the Commission from 9 per cent) and 7.25 per cent for AT&T. In making this finding, the Commission used cost of capital as the basic factor. It had concluded from the evidence that the cost of capital of the private line facilities for AT&T was from 6 to 6.5 per cent and for Western Union 7.5 per cent.

Contrary to what petitioners urge, the evidence, when considered in its totality, substantially supports the

[4] Section 0.21(d), 47 C.F.R. § 0.21(d) (now 28 Fed. Reg. 12397), states that the Common Carrier Bureau "assists, advises and makes recommendations to the Commission."

Commission's findings. Even though the Commission may not have heard expert testimony on the cost studies, a sufficient amount of statistical data was submitted from which the Commission could decide the carriers' cost of capital.

Moreover, the Commission did not go outside the record and depend upon a previous rate case, the so-called *Landline* case, 25 F.C.C. 537 (1958), in arriving at Western Union's cost of capital. What the Commission said was that Western Union's cost of capital (7.5 per cent) was the same as its cost of capital in *Landline*.

In contending that a more extensive cost study should have been undertaken, petitioners overlook the fact that only segments of the carriers' operations were under investigation. The criteria in determining the reasonableness of rates for a particular segment of a utility's operation are different from the criteria to be applied when the level of earnings of an entire business is considered. *Chicago Board of Trade* v. *United States*, 223 F. 2d 348 (D.C. Cir. 1955). For these reasons, we think the Commission correctly adduced that it was unnecessary to make findings or hear evidence in the detail otherwise required for rate of return conclusions.

Using the cost of capital findings as reference points, the Commission also considered the value of AT&T's and Western Union's services to users; risk of discontinuance of service by users for whom costs were incurred in acquiring and constructing specially designed facilities; competition between private line and message services; effect of private line services on the companies' stability; and competitive relationship between private microwave systems and leased services. It was proper for the Commission

to consider these factors in determining the carriers' level of earnings.

The Commission noted that private line service is of "great value to users having specialized or bulk communication requirements," and that "private line services derogate from the usage of the message services, which constitute the largest single service offering of each carrier." Although the Commission said that it made some allowance for these factors in determining the level of earnings, it rejected the carriers' claim that these factors warranted a 10 per cent level of earnings for private line services.

Petitioners contend that the Commission's consideration of the value of service to consumers is contrary to this court's holding in *Natural Gas Pipeline Co.* v. *FPC,* 120 F.2d 625 (7th Cir. 1941), *rev'd on other grounds,* 315 U.S. 575 (1942). That case, however, dealt with the entire business of the utility, not a particular segment. Although we said there that the value of service to the users is not "a reasonable rule," we also said that "the rate of return not only may, but in a utility case, must be, the *largely* determinative factor of reasonableness." (Emphasis added.) The Commission followed the rule enunciated in that case in the instant proceeding. Value of service was only one of the factors used to determine a reasonable level of earnings.

We disagree with petitioners' contention that a consideration of the factors (other than the cost of capital) would result in a conclusion contrary to what the Commission found. Rather, we are convinced that the Commission's consideration of these factors in conjunction with cost of capital could reasonably have resulted in the finding that the level of earnings for AT&T was 7.25 per cent and for Western Union 9 per cent, adjusted to 6.4 per cent.

Cost allocation

Petitioners contend that the Commission erred in allowing rate increases on the basis of cost allocation not supported by adequate findings or by the evidence; that the increase was based in major part upon AT&T's cost study which allocated to private line telegraph service a disproportionate amount of high-cost facilities and only a de minimus amount of low-cost radio relay facilities.

AT&T uses eight types of intercity circuits that differ in their technical characteristics and vary in average book cost from a low of $19.20 per circuit mile to a high of $174.70. Voice frequency cable has an average book cost of $129.14, K-carrier a cost of $44.82, and radio relay a cost of $19.20. The AT&T cost study as of December 31, 1955 indicated the types and the extent of circuits actually being used for private line telegraph intercity service. The study showed that 52.4 per cent of its telegraph service was provided by K-carrier, 17.1 per cent by voice frequency cable, and 0.1 per cent by radio relay.

Petitioners say the assignment to private line service of one-tenth of 1 per cent was disproportionate and resulted in increasing the cost of the circuits allocated to private line service by 26 per cent since radio relay circuits constituted 28.4 per cent of the total circuits used by AT&T for all its services as of December 31, 1955. Further, it is petitioners' position that inasmuch as the allocation of the telegraph service furnished by AT&T was based on engineering criteria employed by the company and the Commission said that it was not called upon and the record would not enable it to pass upon the "absolute validity" of the engineering criteria, the Commission did not make findings on the issue of cost allocation; that its failure to do so violated section 8(b) of the Adminis-

trative Procedure Act, 5 U.S.C. § 1007(b). Moreover, petitioners say that the evidence establishes that the allocation was contrary to actual usage and, therefore, arbitrary. In support of this proposition, they allege that in order to meet competition from privately-owned microwave systems, AT&T twice reduced its rates for large volume users of telegraph channels, initially by filing the multiple channel tariff in September 1955, and subsequently by the "telpak" tariff filed in January 1961;[5] that "if microwave or radio relay systems were too unreliable for telegraph use, it would have been unnecessary for AT&T to lower its private line telegraph rates to meet competition from such service."

The telpak evidence, however, is not in the record, nor was it offered into evidence by petitioners. A judicial review of an administrative order must be based solely upon the record made before the agency. Section 7(a) of the Admininstrative Procedure Act, 5 U.S.C. § 1037(a); *Radio Corp. of America* v. *United States,* 95 F. Supp. 660 (N.D. Ill. 1950), *aff'd,* 341 U.S. 412 (1951). Consequently, the telpak testimony may not properly be considered in this review.

There is no showing that the Commission abused its discretion in not reopening the proceeding to allow the testimony adduced in *Telpak.* As the Supreme Court said in *ICC* v. *City of Jersey City,* 322 U.S. 503 (1944), there is always a gap between the time the record is closed and the time the agency makes its decision and that, if every new circumstance or fact were to be the basis of a reopening of the administra-

[5] Under the telpak tariff, AT&T offers various private line intercity channels under new rate schedules which provide for a volume discount. That tariff is currently under investigation by the Commission.

tive proceeding, "there would be little hope that the administrative process would ever be consummated."

In its initial decision the Commission said that in apportioning costs among the several kinds of service provided by a communication carrier the relative use of each service should be considered, and "to the extent that a particular type of plant is used for a particular service in greater proportion than it is used for another service, the relative costs of that type of plant should be reflected proportionately in the costs of furnishing the service in which it has the greater amount of use."

The Commission, however, did not rely on the apportionment of services submitted by AT&T in the cost study without examination. It examined the basis of these assignments to see whether they were arbitrarily made or were reasonably related to the requirements of private line telegraph service. From such examination, the Commission determined that radio relay was not as reliable for private line services as the more expensive circuits. It also found that the high terminal cost necessary in the use of radio relay made this type of service uneconomical when the distance to be covered was less than 200 miles; moreover, the average length of private line telephone circuits was about 250 miles.

We are satisfied from a consideration of the whole record that the cost allocation found by the Commission was not arbitrary; that it had a rational basis in the evidence; and that it was supported by adequate findings. We think the Supreme Court's observation in *Colorado Interstate Co.* v. *FPC,* 324 U.S. 581, 589 (1945), is apt here: "Allocation of costs is not a matter for the slide rule. It involves judgment on a myriad of facts. It has no claim to an exact science."

Alteration of rate structure

Petitioners argue that the elimination of the clock-hour schedule and minimum period provision and the exclusion of the press from the new rate structure were arbitrary and not supported by either the evidence or adequate findings.

Petitioners say that the clock-hour schedule and minimum period provision have been included in the tariffs for private line telegraph service furnished by AT&T and Western Union for forty years; that the provisions benefit the normal commercial customer and their elimination would have a severe customer impact. They urge that the Commission failed to consider or make findings concerning customer impact. Further, they question the Commission's conclusion "that the differences in the rates for minimum period and continuous services are not justified by cost differences."

The Commission's avowed reason for these alterations in the rate structure is that costs should primarily control rates. It found that "costs of providing continuous service are not substantially greater than for minimum period service," that "there is little, if any, difference in the cost of furnishing service during the day or night," and that "ordinarily telegraph channels furnished for daytime-only leases are not placed in service at night."

We are convinced that on the basis of these findings the Commission was warranted in ruling that the private line telegraph rates were "unreasonably discriminatory" and "should be determined independently of the time of day or night in which service is furnished."

AT&T supports petitioners' contention. Although the company concedes that the finding of substantial identity of cost for minimum and continuous service

is "fully supported by the evidence," it says that the Commission should have considered customer impact (value of service), and that had it done so, it would not have altered the rate structure.

The Commission, however, was cognizant of the impact on customers. It said: "We are aware that changes in the telegraph rate structure . . . will result in substantial increases to certain customers and in reductions to others." There is no indication in the record that the carriers would lose customers to other services or that the customers would be significantly affected economically by these changes. The weight to be given customer impact by the Commission in these circumstances is a matter for expertise competence and is discretionary.

It is also urged that the Commission acted arbitrarily in continuing the proceeding to determine whether special rates should be prescribed for the press. However, section 201(b) of the Communications Act, 47 U.S.C. § 201(b), sanctions this procedure. That section provides: "[C]ommunications by wire or radio subject to this chapter may be classified into day, night, * * * commercial, *press,* Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications." [Emphasis added.]

In staying the operation of the new rates as applied to the press, the Commission said: "On the basis of the record made in these proceedings * * * we are unable to evaluate the extent to which such changed [private line telegraph] rates, if applied to the press, would impair the widespread dissemination of news information." In support of this statement, the Commission said that it was "in the public interest to institute a separate investigation * * * to determine

whether the imposition of the same charges applicable to other users would significantly impair the widespread dissemination of news information." In view of section 201(b) which gives the Commission discretion to place the press in a different rate classification and the agency's statement, the Commission's action was not arbitrary or discriminatory.

We find no error in the other rate changes about which complaint is made nor do we think it necessary to discuss them.

The petition to set aside the Commission's orders is denied.

APPENDIX B

In the United States Court of Appeals for the Seventh Circuit

WILSON & CO., INC., SWIFT & COMPANY, and ARMOUR AND COMPANY, *Petitioners,* *vs.* UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents.*	No. 14269 On Petition To Review Orders of the Federal Communications Commission.

September 17, 1964

DECREE

This cause came to be heard on the Joint Petition to review and set aside orders of the Federal Communications Commission, and the transcript of the record from the Federal Communications Commission, and was argued by counsel.

On consideration whereof, it is ORDERED, ADJUDGED and DECREED that the orders of the Federal Communications Commission released on July 14, 1961, January 30, 1963, and May 29, 1963 in FCC Docket Nos. 11645 and 11646 be, and the same are hereby AFFIRMED, and that the Joint Petition to set aside the said orders be,

and the same is hereby DENIED, in accordance with the opinion of this Court filed August 14, 1964.

It is further ORDERED, ADJUDGED and DECREED that the above-mentioned orders of the Federal Communications Commission and the tariff schedules filed pursuant thereto by intervenors American Telephone & Telegraph Company and the Western Union Telegraph Company shall become effective on the first day of the month following the date of this decree.

It is further ORDERED, ADJUDGED and DECREED that the Interlocutory Injunction entered by this Court on September 27, 1963, shall continue in effect through the last day of the month in which this Decree is entered and shall thereupon be dissolved.

A True Copy:
Teste:

KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

United States Court of Appeals for the Seventh Circuit, Chicago 10, Illinois

Wednesday, July 31, 1963

Before Hon. WIN G. KNOCH, Circuit Judge; Hon. ROGER J. KILEY, Circuit Judge

WILSON & CO., INC., ET AL., *Petitioners,* *vs.* FEDERAL COMMUNICATIONS COMMISSION, ET AL., *Respondents.*	No. 14269 Petition for review of an order of the Federal Communications Commission.

This cause came on to be heard upon the petitioners' application for interlocutory injunction restraining the enforcement of Federal Communications Commission orders in FCC Dockets Nos. 11645 and 11646 so far as such orders prescribe rates to be effective August 1, 1963 for private line telegraph services furnished petitioners by American Telephone and Telegraph Company and Western Union Telegraph Company pending disposition of petitioners' Joint Petition For Review of said orders; and upon petitioners' motion for temporary stay of said Commission orders pending disposition by this court of their application for said interlocutory injunction pending disposition of the said Joint Petition For Review; and upon mo-

tion of A.T. & T. and Bell System Companies for oral argument on petitioners' said motion for temporary stay.

The court having read the pleadings of the several parties and being further fully advised, IT IS ORDERED that the motion of A.T. & T. and Bell System Companies for oral argument is denied.

It appears to the court from the facts stated in the pleadings before it that irreparable damage would result to petitioners in additional charges for interstate private line telegraph services approximating $95,510.00 per year, and the court so finds for the purpose of this temporary stay,

IT IS THEREFORE ORDERED that petitioners' motion for a temporary stay of the effect of the operation of Federal Communication Commission's orders in FCC Dockets Nos. 11645 and 11646 be and it is hereby granted as to the orders in their entirety; and said orders of the Commission are stayed for sixty (60) days from this date pending the hearing on petitioners' application for an interlocutory injunction restraining the enforcement of said Commission orders, said hearing to be held within said sixty (60) days, at such time as this court will designate on due notice to the parties and to the Attorney General of the United States.

IT IS FURTHER ORDERED that the issues raised by petitioners' application for interlocutory injunction restraining operation of the Commission's said orders, pending review of the Joint Petition For Review, be and the same are hereby reserved to the hearing on the application for interlocutory injunction to be heard at the time to be set by this court.

IT IS FURTHER ORDERED that the order heretofore entered on this date in the above cause be, and the same is hereby vacated and set aside.

APPENDIX D

United States Court of Appeals for the Seventh Circuit, Chicago 10, Illinois

Friday, September 27, 1963

Before Hon. WIN G. KNOCH, Circuit Judge; Hon. ROGER J. KILEY, Circuit Judge; Hon. LUTHER M. SWYGERT, Circuit Judge

WILSON & CO., INC., ET AL., *Petitioners,* *vs.* FEDERAL COMMUNICATIONS COMMISSION, ET AL., *Respondents.*	No. 14269 Petition for review of an order of the Federal Communications Commission.

This cause came on to be heard (i) upon petitioners' application for an interlocutory injunction restraining the enforcement of orders issued by Federal Communications Commission in F.C.C. Docket Nos. 11645 and 11646 so far as such orders prescribe rates to be effective August 1, 1963, for private line telegraph services furnished by American Telephone & Telegraph Company and Western Union Telegraph Company pending disposition of Petitioners' Joint Petition for Review of said orders; (ii) upon the order of this Court entered herein on July 31, 1963, after due notice and on petitioners' motion and after

finding on evidence submitted irreparable damage would result to petitioners, staying the effect of said orders in their entirety for sixty (60) days pending a hearing on petitioners' application for an interlocutory injunction; and (iii) upon the request of Federal Communications Commission and the United States of America for oral argument upon said application, which motion for oral argument was granted by the Court and held, after due notice to all parties, on September 26, 1963, at which time counsel for petitioners, for respondents Federal Communications Commission and the United States of America and for intervenors American Telephone & Telegraph Company and Western Union Telegraph Company, appeared and presented argument respecting said application for injunction.

The Court, after hearing and having considered the pleadings, briefs and motions of the several parties, including the evidence submitted respecting the effects of said Commission orders, an interlocutory injunction and alternative suggestions for relief submitted by respondents and intervenors and having heard oral argument and being further fully advised, is of the opinion and finds that, if enforcement of said orders is not restrained, irreparable damage would result to petitioners by way of imposition of additional charges for interstate private line telegraph services approximating $95,510.00 per year.

The Court further finds that the granting of said application for interlocutory injunction without restraining the enforcement of said Commission orders in their entirety, would work irreparable damage to numerous others, including carriers and other customers.

IT IS THEREFORE ORDERED that petitioners' application for an interlocutory injunction staying and sus-

pending the effectiveness with respect to petitioners of the Federal Communications Commission orders in F.C.C. Dockets Nos. 11645 and 11646 be and is hereby granted pending final hearing and determination of the Joint Petition for Review.

IT IS FURTHER ORDERED that said orders of the Commission be and are hereby suspended and the enforcement, operation or execution of said orders be and is hereby restrained in their entirety pending final hearing and determination of the Joint Petition for Review.

APPENDIX E

United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, 60610

Tuesday, November 12, 1963

Before Hon. JOHN S. HASTINGS, Chief Judge; Hon. F. RYAN DUFFY, Circuit Judge; Hon. ELMER J. SCHNACKENBERG, Circuit Judge; Hon. WIN G. KNOCH, Circuit Judge; Hon. LATHAM CASTLE, Circuit Judge; Hon. ROGER J. KILEY, Circuit Judge; Hon. LUTHER M. SWYGERT, Circuit Judge

WILSON & CO., INC., ET AL., *Petitioners,* *vs.* FEDERAL COMMUNICATIONS COMMISSION, ET AL., *Respondents.*	No. 14269 Petition for review of an order of the Federal Communications Commission.

This matter comes before the Court sitting en banc on the motion of the United States of America and the Federal Communications Commission for rehearing en banc, for modification of injunction, or a stay of injunction, filed herein on October 9, 1963; the petitioners' reply to the motion of the United States of America and the Federal Communications Commission for rehearing en banc, etc.; and the response of the American Telephone and Telegraph Company and Bell System Associated Companies in opposition to

the motion of the United States and the Federal Communications Commission for rehearing en banc, for modification of injunction, or a stay of injunction; and all of the active members of this Court excepting Judge Schnackenberg, who disqualified himself, having considered the said motion, reply and response, and being fully advised in the premises,

IT IS HEREBY ORDERED that the said motion filed on October 9, 1963, be, and the same is hereby DENIED.

(Judge Duffy is of the opinion that a bond should be required of American Telephone and Telegraph Company in order to protect the public from any injury that might result from the injunction heretofore ordered by this Court.)

(Judge Schnackenberg disqualified himself.)

APPENDIX F

United States Court of Appeals for the Seventh Circuit, Chicago, Ill.

No. 14269

WILSON & CO., INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., RESPONDENTS

Petition for review of an order of the Federal Communications Commission

Wednesday, October 30, 1963

Before WIN G. KNOCH and ROGER J. KILEY, Circuit Judges.

This matter comes before the Court on the motion of United States of America and Federal Communications Commission for leave to file additional pleading, and petitioners' reply to said motion, and the Court being fully advised in the premises,

IT IS ORDERED that the said motion be, and it is hereby, denied.

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No. [redacted]56

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

UNITED STATES OF AMERICA, et al., *Petitioners,*

v.

WILSON & CO., INC., et al., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT TELEPHONE COMPANIES IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 909

UNITED STATES OF AMERICA, et al., *Petitioners,*

v.

WILSON & CO., INC., et al., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT TELEPHONE COMPANIES IN OPPOSITION TO PETITION FOR CERTIORARI

JURISDICTION

The Petition invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals, having suspended and thereafter affirmed an administrative order which prescribed both increases and decreases in rates for telephone and telegraph private line services, abused its equitable discretion, under the particular and nonrecurring facts of this case, by not providing restitution to users of telephone services for the period of the suspension.

STATEMENT

A. The Nature of the F.C.C. Order.

The order of the Federal Communications Commission which underlies this controversy prescribed a comprehensive readjustment of rates for private line services furnished by the American Telephone & Telegraph Company and Bell System Associated Companies (hereinafter referred to as the telephone companies) and The Western Union Telegraph Company. Numerous rates were affected, since the rates for private line services depend upon the length and characteristics of the circuit and the types of equipment used at the terminals.

The rates in effect prior to the F.C.C. order were set forth in tariffs on file with the F.C.C. and had been developed over the years on the basis of the various considerations normally reflected in the making of public utility rates. There was no claim that these pricing practices produced overall earnings that were unreasonably high, and it was the telephone companies' position that the rates for each of the private line services and the components within each service need not be directly correlated with costs.

The carriers, at the request of the F.C.C., prepared studies and introduced evidence in the Commission proceeding showing the costs of furnishing the various components of each of the private line services. The Commission, in its decision, prescribed new rates for each component of service based directly upon its cost. The Commission's cost basis of rate-making was not applied simply to the telephone rates as one broad category and the telegraph (teletypewriter) rates as another; the Commission's approach was to fix the rates for each component of each of the private line services as closely as possible to the costs associated with that segement of private line service.

This approach to rate-making resulted in a vast reshuffle of all private line rates. The existing rates were reduced in varying degrees for long-haul telephone and continuous telegraph circuits. The rates were increased in varying degrees for short-haul telephone and part-time telegraph circuits. All of these increased and decreased rates, and many others, were embraced in a single Commission order based on the single theory of making rates directly related to the cost of each component of service.

The Commission did not find that the private line rates of the telephone companies were, as a whole, unreasonably high. Indeed, the Commission's findings contemplated that the new rates would increase the telephone companies' revenues (R. 299)[1] In this context, the Government's repeated description of the existing telephone rates as "excessive" simply means that through application of the cost method of rate-making, many telephone rates, along with other private line rates, were reduced at the same time that many other rates were increased. The net effect of the Commission's order on telephone company revenues, considering all of the rate changes, was substantially offsetting.

Whether the net effect of the new rates on the revenues of the telephone companies was precisely offsetting, or produced a relatively small increase or decrease in revenues, depends upon the volume and proportion of the use of the various categories of private line services at any particular time. The Commission's findings contemplated that the net effect of the Commission's order would be to increase the telephone companies' revenues by $2,156,000 per year (R. 299), an increase of about 2.5 percent of the total private line revenues (R. 307, 308). By 1963, the volume and proportions of usage of the various private line services were

[1] As in the Petition for Certiorari, "R. . . ." refers to the Appendix filed in the Court of Appeals by the meat packers.

such that the effect of the new rates on telephone company revenues was substantially offsetting.[2] Estimates based on billing rates for each customer for September 1964 and October 1964 (multiplied by the 14 month period that the rates were suspended) indicate that the new rates would have had the net effect of reducing telephone company revenues by $1,637,000 (a reduction of 0.8 percent of the private line revenues covered by the F.C.C. order).[3]

B. The Proceedings in the Court of Appeals.

Three meat packers, users of private line services subject to rates increased by the Commission's order, filed a Joint Petition for Review in the Court of Appeals. The grounds of this Petition for Review challenged, *inter alia,* the cost theory that formed the basis for the prescription of all new private line rates (R. 329-338). As the meat packers stated

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[2] Affidavit of Francis J. Woods, attached to telephone companies' Answer to Application for Interlocutory Injunction dated July 29, 1963.

[3] At page 11 of the Petition, the Government states: "AT&T argues that restitution of some $7,000,000 which would be due certain of its customers should not be decreed because AT&T was deprived by the injunction of over $5,250,000 in higher rates prescribed by the Commission." The "$7,000,000" figure represents the estimate of reductions in rates for telephone users whose rates were reduced (rounded from $7,291,000). The "$5,250,000" figure does not represent all of the "higher rates prescribed by the Commission," but does approximate the estimate for telegraph users whose rates would be increased ($5,673,000). For all private line customers whose rates were increased by the Commission the estimate is $7,560,000 and for all customers whose rates would be reduced the estimate is $9,197,000, indicating a net reduction of $1,637,000. The figures shown for the September 1964-October 1964 analysis treat customers using both telephone and telegraph services as separate customers. No claim is made that the September-October billing data are representative of the entire period.

below, the grounds of their Petition for Review "challenge the validity of the F.C.C. orders in their entirety."[4]

The meat packers moved that the private line telegraph rates be suspended pending judicial review "with respect to petitioners."[5] The telephone companies filed an answer asking that interlocutory relief be denied so that all the new rates would become effective at once; the telephone companies also answered that it would be inequitable to stay the operation of the Commission's order as to petitioners, whose rates would be increased, without staying the entire order before the court.[6] The Court of Appeals entered a temporary stay, and thereafter entered an interlocutory injunction, suspending the Commission's orders in their entirety. At every stage of the litigation preceding the entry of the interlocutory injunction, the Government insisted that reduced rates be imposed upon the telephone companies even though increased rates prescribed in the same order on the same theory of rate-making were suspended.[7]

After denial of a petition for rehearing directed to the interlocutory injunction, the United States and the Commission petitioned for a writ of certiorari (No. 711, 1963 Term), claiming that the Court of Appeals should have attached to its interlocutory injunction requirements that, if the Commission's order were affirmed, the telephone companies make refunds to telephone customers whose rates were reduced

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[4] Reply to Motion for Modification of Temporary Stay, August 12, 1963, p. 2. The "orders" referred to are the single order prescribing the new private line rates pursuant to the Commission's Final Decision (R. 304-305), and the same order, amended as to the effective date, entered by the Commission after consideration of petitions for reconsideration (R. 322-323).

[5] Application for Interlocutory Injunction, p. 4.

[6] Answer dated July 29, 1963.

[7] See Government Motion dated August 2, 1963, Motion dated August 16, 1963, and Supplemental Brief dated September 23, 1963.

and that billing records be preserved during the period the rates were suspended. Our Brief in Opposition urged that it would be inequitable to burden the telephone companies with reductions in rates while depriving them of increased rates prescribed in the same order. We also urged that the issue of restitution was premature and that the billing records were being preserved in any event. With the assurance as to preservation of records, the Solicitor General withdrew his support of the Petition. The Commission's Petition was denied. 376 U.S. 944.

On August 14, 1964, the Court of Appeals issued its opinion affirming the Commission's orders. The Government thereupon submitted a proposed decree which included a provision that the court retain jurisdiction to consider an award of restitution. After the filing of objections to the proposed decree,[8] the Court of Appeals entered its final decree on September 17, 1964, in which it affirmed the Commission's order, dissolved the suspension of the new rates effective October 1, 1964, and made no provision for restitution or for retaining jurisdiction.[9]

REASONS FOR DENYING THE WRIT

The Government's Petition does not present any basic question of law, but only the question of whether, on the particular facts of this case, the Court of Appeals has abused its equitable discretion by not providing restitution.

There is no question as to the statutory authority of the Court of Appeals to suspend the Commission's order pend-

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[8] See Objections of Western Union dated September 2, 1964, and Suggestions of meat packers dated September 3, 1964. See also Comments of telephone companies dated September 3, 1964, and the Government's Memorandum dated September 9, 1964.

[9] The meat packers' petition for certiorari directed to the affirmance of the Commission's order has been filed as No. 765, this Term.

ing judicial review. Last Term, the Government expressly disclaimed any contention that the Court of Appeals had abused its discretion in suspending the entire order, including the telephone rates (Petition in No. 711, Oct. Term 1964, p. 16).[10]

Nor is there any difference between the parties with respect to the law applicable for the period during which the rates were suspended. The tariffs containing the newly prescribed rates were not effective during the period of suspension, but the telephone companies have never questioned the Court of Appeals' jurisdiction to award restitution in a case in which the equities call for the exercise of such jurisdiction.

The Government asserts that the question presented in this case is whether the court below "had a duty in equity" to require the carrier to make refunds to telephone customers whose rates were reduced (Petition, p. 2). The question actually presented is the broader one of whether equity was done, having regard to all the circumstances of the case. The equities to be considered include those of car-

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[10] The Government's inconsistent suggestion that AT&T "was hardly entitled to enlarge the scope of the review proceeding" (Petition, p. 13) is entirely beside the point. The Petition for Review defined the scope of the proceeding and rested on grounds that challenged the F.C.C. order in its entirety (Statement, pp. 4-5, *supra*). The sole concern of the telephone companies was equitable treatment during judicial review of a single order of the Commission prescribing both increases and decreases in rates.

The Government's belated suggestion that AT&T should have filed a "conditional petition for review" (Petition, pp. 12-13) is also beside the point. It would be unsound and inequitable to require carriers to burden the Court of Appeals with additional Petitions for Review of orders that the carriers are willing to place in effect, simply to obtain equitable treatment for the period during which rates are suspended at the instance of users and over the objection of the carriers.

riers as well as rate-payers. *Iyland Steel Co.* v. *United* States, 306 U.S. 153. And while equity may call for restitution under one set of facts, equity may, under other facts, require the court to "stay its hand and leave the parties where it finds them." *Atlantic Coast Line R. Co.* v. *Florida*, 295 U.S. 301, 314. The Government gives no recognition to the principle that "Restitution is not of mere right. It is *ex gratia*, resting in the exercise of a sound discretion, and the court will not order it where the justice of the case does not call for it . . ." *Id.*, 295 U.S. at 310.

The circumstances of the instant case, as we shall show, are such that the Court of Appeals did not abuse its discretion by leaving the parties where it found them.

1. The Court of Appeals Did Not Abuse Its Equitable Discretion.

The refusal of the Court of Appeals to provide for restitution was equitable in light of the nature of the Commission's order prescribing numerous increases and decreases in rates for the various categories of private line services. Whether or not the increases or decreases in rates are precisely offsetting at any given time,[11] the treatment which the Government asks this Court to impose would be manifestly inequitable. The following table illustrates the equities of the situation in a simplified but realistic way:

Customer	Old Rate	New Rate	Change
A (long telephone circuit)	$100	$ 93	$ -7
B (short telephone circuit)	30	32	+2
C (continuous long telegraph circuit)	50	47	-3
D (8-hour short telegraph circuit)	20	28	+8
	$200	$200	0

[11] See Statement, pp. 3-4, *supra*.

Where all the new rates were suspended pending judicial review and thereafter upheld, the Government contends that the court must order the carrier to refund the reduced telephone rates (Customer A would be paid $7). The Government would thus take a situation in which a rate order has no effect, or relatively little effect, upon the revenues of a carrier, and convert that situation to the injury of the carrier. The Government would impose this result where the Court of Appeals decided, over the opposition of the carrier, to suspend the rates pending judicial review upon the application of customers whose rates would be increased.[12]

The Government suggests that the Court of Appeals might consider offsetting the increases and decreases in telephone rates "in computing the windfall to AT&T from the stay of telephone rates" (Petition, pp. 11-12, note 7).[13] But the Government would not permit the carrier to offset the increases in telegraph rates (Customer D) in computing "the windfall." Nor does the Government propose any payment to the telegraph (teletypewriter) user whose rates were decreased (Customer C would get nothing). The concept underlying the Government's position is that an arbitrary iron curtain should be dropped across the Commission's order, dividing the changes in rates for telephone services from those for telegraph services in defiance of the integral nature of the Commission's rate prescription. The Government proposes a kind of selective "equity" that

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[12] Because only three of several thousand private line users are parties to the action in the Court of Appeals, restitution for the benefit of the carrier is not available with respect to the rates which were increased.

[13] In terms of the above example, the increase in telephone rates that Customer B would have paid but for the stay ($2) would be offset against the refund to Customer A ($7), for a net payment of $5 to Customer A.

would single out certain customers for favored treatment, ignore others, and inflict unjust injury upon the carrier.

There is no basis in the order of the Commission for such an arbitrary demarcation. As shown in the Statement (pp. 2-3, *supra*), the F.C.C. issued a single order, based on a single theory of rate-making, which changed the rates for many separate categories of private line services, whether telephone or telegraph. During the proceedings before the F.C.C., the Commission itself condemned as unrealistic any separation of the investigation of rates for telephone and telegraph services. In its Order dated January 29, 1959, denying a petition of telegraph users for a separate record, the Commission stated (R. 427, 430):

> "[The] determination of just and reasonable rates applicable to AT&T's private line telephone services [involves] cost and rate structure considerations which, in large measure, *are inseparable* from considerations pertinent to the determination of teletypewriter [telegraph] rates. We do not see how it would be realistic or conducive to an expeditious determination of the issues herein to attempt to fragmentize the proceeding in these respects even if it were possible to do so." (Emphasis supplied.)

Although the Government's entire position depends upon the separability of the F.C.C. order as between telephone and telegraph services, the Petition does not attempt to cope with the conclusion of the F.C.C. itself not to "fragmentize" the proceeding because the considerations affecting the rate structure for both telephone and telegraph services "are inseparable."

When the Commission's order is treated as the single order it is, the bottom drops out of the Government's position. The whole purpose of the restitution remedy which the Government seeks to invoke is to prevent "unjust enrichment." *Stone* v. *White*, 301 U.S. 532, 534; ALI, Restate-

ment, Restitution, § 1.[14] The carrier is not unjustly enriched by the suspension of an order which prescribes substantially offsetting increases and decreases in rates.[15] Such consideration of offsetting transactions goes to the heart of the doctrine of restitution.[16]

The equitable doctrine of restitution thus requires that telephone rate increases be offset against telephone rate reductions (as the Government itself suggests, Petition, pp. 11-12, note 7), and, for the same reason, equity requires that all rate increases under the F.C.C. order be offset against all rate reductions. This is the substantial effect of the Court of Appeals' refusal to provide restitution in this case.

Not one of the cases cited in the Petition (p. 10) supports the Government's position that the telephone companies should pay restitution for rate decreases without regard to rate increases. Nor do any of the cases cited hold that a carrier may be required to pay back revenues in excess of those which it actually received. Indeed, the quotation from *Baltimore & O. R. Co.* v. *United States*, 279 U.S. 781, 786 (Petition, pp. 10-11), is taken out of context for, immediately preceding the quotation in the Petition, the Court emphasized that "All payments made by appellants in compliance with the invalid order inured to the benefit of

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[14] "A cause of action for restitution is a type of the broader cause of action for money had and received, a remedy which is equitable in origin and function." *Atlantic Coast Line R. Co.* v. *Florida*, 295 U.S. 301, 309.

[15] This is particularly true where, as in this case, the Commission's findings indicated that the revenues of the carrier would be *increased* by over $2 million per year (see Statement, p. 3, *supra*).

[16] *Stone* v. *White*, 301 U.S. 532, 534-535, 537. See also cases cited in *Atlantic Coast Line R. Co.* v. *Florida*, 295 U.S. 301, 309, 310, holding that losses may be offset against gains, even in the extreme case where the reason for restitution is fraud.

[appellees]" (279 U.S. at 786). Here, the Government is asking that restitution be decreed whether or not the carrier received any benefit at all under the administrative order in question.[17]

The Court of Appeals, upon completion of the judicial review proceeding, and with its familiarity of the offsetting effect of the rates prescribed in the inseparable order under review, was specially fitted to pass upon the equities of this particular case. The Court of Appeals did not abuse its discretion by leaving the parties where it found them. The Court of Appeals left the parties in exactly the same position during the period of judicial review in which the Commission itself left them during the period for which it postponed the effective date of its entire order pending its consideration of petitions for reconsideration (R. 471).

2. No Question of General or Future Importance Is Presented.

The Government's assertion that the action of the court below "has wide significance as a precedent and is of general concern from the standpoint of effective rate regulation" (Petition, p. 9) is not correct.

This case involves only the exercise of equitable discretion with respect to the special circumstances of the F.C.C. order under review in the court below. The Government's primary objection to the judgment below stems from its artificial and unrealistic concept of the separability of this F.C.C. order as between telephone and telegraph private

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[17] The Government would have this Court put aside equitable considerations and, in the guise of restitution, impose liability for damages contrary to the settled law that the issuance of an injunction cannot be the basis of an action for damages. See *Greenwood County* v. *Duke Power Co.*, 107 F.2d 484, 487-488 (C.A. 4), *cert. den.*, 309 U.S. 667, and cases cited therein.

line rates (pp. 9-10, *supra*). The determination of the separability of this particular administrative order hardly rises to the status of a decision having "wide significance as a precedent."

The decision below cannot possibly cause any concern for the future of "effective rate regulation" because the question decided should never arise again. The question arose in this case only because the Government repeatedly sought to impose upon the telephone companies an obligation to refund reduced rates where the carriers could not collect the increased rates prescribed by the same order. This situation should not recur because the Solicitor General has now stated, on behalf of the Government and the Commission, that the proper approach would be to stay reductions in rates, including the telephone rates, and permit the carriers to collect increases in rates, subject to refund consistent with the Court's final determination (Petition, p. 13). If the Government had not persisted in its position in the court below, inconsistent with the equitable approach which the Solicitor General now calls "commonplace," the question now before the Court would never have arisen.[18]

Because the Government now advocates an equitable solution of the problem that would be raised in any future judicial review of a similar F.C.C. order, the question decided below has no future significance. This Court has

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[18] The Government blames AT&T for not suggesting this approach at the time the interlocutory injunction was sought and granted (Petition, p. 13, note 9). This is a wholly unrealistic suggestion in view of the Government's stubborn insistence that the telephone rates were separable and could not in any event be suspended without a condition requiring refund (see Statement, p. 5, *supra*). The Government did not depart from that erroneous and inequitable position until after the issuance of the interlocutory injunction and, when such a proposal was belatedly made, the telephone companies concurred in it. The meat packers vigorously opposed the proposal, and the Court of Appeals rejected the Government's motion. (See Government's Motion for Leave to File Additional Pleadings, Petitioners' Opposition, and the Order of the Court of Appeals, dated October 30, 1963.)

made it plain that the "special and important reasons" required for the granting of a writ of certiorari (Rule 19) "imply a reach to a problem beyond the academic or the episodic." *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74. See also *District of Columbia* v. *Sweeney*, 310 U.S. 631; *English* v. *Cunningham*, 361 U.S. 905, 907. Under the Rules and decisions of this Court, there is no basis for granting a writ of certiorari to review the "episodic" exercise of equitable discretion by the court below in dealing with a situation that should never arise again.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 56

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, PETITIONERS

v.

WILSON & CO., INC., SWIFT & COMPANY, ARMOUR AND COMPANY, AMERICAN TELEPHONE AND TELEGRAPH COMPANY AND BELL SYSTEM ASSOCIATED COMPANIES

JOINT MOTION TO REMAND TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT FOR ENTRY OF A DECREE OF RESTITUTION

The petition for certiorari in this case, which this Court granted on March 29, 1965 (380 U.S. 950), stated the question presented in the following terms (p. 2):

> The Federal Communications Commission entered orders revising common carrier rates for private-line telegraph service and private-line telephone service, the general effect of which was to raise telegraph rates and to lower telephone rates. Only the higher telegraph rates were challenged in the review proceeding brought by the respondent meatpacking concerns. On the meatpackers' motion to stay the telegraph increases, the court below, accepting

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the proposal of American Telephone and Telegraph Company (an intervenor), stayed, *pendente lite*, the whole of the Commission's orders, including the lowered telephone rates, and declined to condition the stay so as to protect telephone customers who might be adversely affected. In its final decision, the court of appeals affirmed the Commission's orders in all respects. Despite the government's request, the court terminated the proceeding without considering or providing restitution to those customers who were deprived, during the pendency of the appeal, of the lower telephone rates ordered by the Commission.

The question presented is whether the court of appeals had a duty in equity, once it had sustained the Commission's rate orders on the merits, to require the carrier to return to its private-line telephone customers the excess rates it had collected, under the stay *pendente lite*, during the pendency of the appeal.

Petitioners and respondents American Telephone and Telegraph Company and Bell System Associated Companies[1] have agreed that the court of appeals should enter a decree of restitution for the benefit of the private-line telephone customers whose rates for

[1] Respondents Wilson & Co., Inc., Swift & Company and Armour and Company, petitioners for review in the court below, are only nominal parties in this Court and have stated that they have no interest in the question presented by the petition for certiorari granted in this case. Counsel for these respondents, Miss Sharon King, has been apprised of the fact that agreement has been reached between petitioners and respondent telephone companies and has advised the Solicitor General that respondent meatpacking companies have no objection to the entry of an order of remand.

that service were reduced by the Federal Communications Commission's orders involved here but from whom respondent telephone companies—as a result of the court of appeals' stay—collected greater revenues between August 1, 1963, and September 30, 1964, than they would have collected had the above-mentioned Commission orders become effective on August 1, 1963. These parties have also agreed on a specific decree of restitution (a copy of which is attached as an Appendix to this motion) which they believe to be equitable and desire to submit for entry by the court of appeals.

Therefore, petitioners and respondents American Telephone and Telegraph Company and Bell System Associated Companies hereby jointly move this Court to remand the cause to the Court of Appeals for the Seventh Circuit in order to permit entry of a decree of restitution in accordance with the agreement of these parties.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

HOWARD J. TRIENENS,
Counsel for Respondents American Telephone and Telegraph Company and Bell System Associated Companies.

JANUARY 1966.

APPENDIX

In the United States Court of Appeals for the Seventh Circuit

No. 14269

WILSON & CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS

On Petition To Review Orders of the Federal Communications Commission

DECREE OF RESTITUTION

THIS CAUSE having been remanded to this Court for the purpose of entering a decree of restitution;

IT IS HEREBY ORDERED that, within 180 days of the date of this Decree, respondents American Telephone & Telegraph Company and Associated Bell System Companies make restitution payments to its customers using private-line telephone services, computed as follows: (1) determine for each customer of private-line telephone service whose charges were decreased as a result of the orders of the Federal Communications Commission, the difference between the contract revenue value of September 1964 service as billed and the contract value of said service priced at October 1964 rates; (2) determine the total of decreases calculated in the foregoing step (1); (3) similarly determine and subtract from said total the total of dif-

ferences in telephone contract revenue for customers whose telephone charges increased, and divide the difference so obtained by the total of decreases determined in the foregoing step (2); (4) apply the ratio calculated in the foregoing step (3) to the decrease determined for each customer in the foregoing step (1) and determine the percentage that the adjusted difference is of the September 1964 contract value; (5) apply the percentage determined in the foregoing step (4) to the contract value of private-line telephone service as billed for each of the months August 1963 through September 1964; (6) for customers of both telephone and telegraph service whose charges for telegraph service were increased as a result of the orders of the Federal Communications Commission, calculate each customer's September–October telegraph increase as a percentage of the September 1964 telegraph contract value; (7) apply said percentage to the contract value of telegraph service for each of the months August 1963 through September 1964, to determine the telegraph offsets; (8) subtract the amounts computed in the foregoing step (7) from the adjusted monthly telephone decreases computed in the foregoing step (5); (9) for any month in which differences in contract values employed in the foregoing steps (5) and (7) indicate that the September 1964 base may not be representative, review the composition of the customer's service and, if the adjustment percentage calculated for September 1964 is found not to be representative, calculate a new percentage, using that month as a base, and apply the new percentage to that and other months for which it is representative (such a review will be made whenever a month's contract value of a customer's service differs from the base month contract value by more than 10%); (10) for any customers who received private-line telephone service during a part of the period

August 1963–September 1964 who did not receive service in September 1964, calculate restitution generally as outlined in the foregoing steps using the last month of service as a base.

Dated this —— day of ————, 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966